(36)

Office - Supreme Court, U. S.
MAY 27 1944
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 1040

MARTIN LUKSICH,

Petitioner,

vs.

DOMENIC MISETICH, JAKOV MISETICH, IVAN MISETICH, and ANTON MISETICH,

Respondents,

BRIEF OF RESPONDENTS IN REPLY TO PETITIONER'S BRIEF.

LASHER B. GALLAGHER,
720 Rowan Building, Los Angeles,
Attorney for Respondents.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

SUBJECT INDEX.

PAGE

Summary 4

Argument 5

Point I. Is a seaman, injured to the extent that he must leave the service of the ship for medical attention ashore, entitled, as a matter of law, to whatever wages or share he might have earned to the end of the specific voyage during which he sustained such injury, or is he entitled to his prospective wages or share for the entire term of the specific contract of employment in effect at the time he sustains the injury? 5

If such injury is one which permanently and totally disables the seaman from following his occupation as a seaman, is he, as a matter of law, entitled to maintenance during the balance of his natural life or during whatever period of time medical or surgical care is beneficial to the seaman?..... 5

Point II. Does the court-made rule that a seaman is a ward of the Admiralty courts and must be treated as such in the decision of disputed issues in litigation between a seaman and his employer, violate the constitutional right of the employer to procedural due process of law?..... 14

Point III. Do the decisions of this Honorable Court, in construing the provision for the election to be made by a seaman, as provided in the Jones Act, violate the mandate of the Constitution that all persons are entitled to the equal protection of the law?..... 19

Point IV. Do the decisions construing the Jones Act and its place in the maritime law deprive employers of seamen of their property without due process of law?..... 23

Point V. Does the United States Supreme Court have jurisdiction of the persons and subject matter?..... 30

PAGE

Point VI. If the case of Van Camp Sea Food Co., Inc. v. Nordyke (140 F. (2d) 902) also pending herein on petition for writ of certiorari and numbered 959, is not in conflict with applicable decisions of this Honorable Court and correctly construes the scope of a seaman's action for damages under the Jones Act, then the judgment on the first cause of action in the case at bar is res judicata as to libellant's claim for wages and maintenance..... 32

Conclusion 36

TABLE OF AUTHORITIES CITED.

CASES. **PAGE**

Aguilar v. Standard Oil Co. of New Jersey, 318 U. S. 724..... 17
Arizona Eastern R. Co. v. Bryan, 242 U. S. 621..... 20
Beadle v. Spencer, 298 U. S. 124..... 26
Calmar S. S. Corp. v. Taylor, 303 U. S. 525.....9, 14, 16, 22
Chelentis v. Luckenbach S. S. Co., 247 U. S. 372..... 28
Chesapeake etc. R. Co. v. Carnahan, 241 U. S. 241..... 20
Chicot County Drainage District v. Baxter State Bank, 308 U. S. 371..... 35
Engel v. Davenport, 271 U. S. 33..... 29
Enochasson v. Freeport Sulphur Co., 7 F. (2d) 674.....5, 11
Geneva Furniture Mfg. Co. v. Karpen, 238 U. S. 254..... 31
Grubb v. Public Utilities Commission, 281 U. S. 470..... 34
Jordan v. Massachusetts, 225 U. S. 167..... 16
Keathley v. Chesapeake etc. R. Co., 85 W. Va. 173, 102 S. E. 244 20
Mahnich v. Southern S. S. Co., 88 L. Ed. Adv. Op. 414..... .....24, 26, 27
Mason v. Evanisevich, 131 F. (2d) 858.....7, 11
Matthews v. Atchison etc. Ry. Co., 54 Cal. App. (2d) 549, 129 P. (2d) 435..... 20
Michigan Central R. Co. v. Vreeland, 227 U. S. 59..... 20
Nashville etc. Ry. v. Henry, 158 Ky. 88, 164 S. W. 310..... 20
National Labor Relations Board v. Waterman S. S. Corp., 309 U. S. 206..... 9
Newkirk v. L. A. Junction Ry. Co., 20 Cal. (2d) 308, 131 P. (2d) 535 20
O'Donnell v. Great Lakes Dredge & Dock Co., 127 F. (2d) 901 6
Pacific S. S. Co. v. Peterson, 278 U. S. 130.....21, 25, 27, 29

PAGE

Panama R. Co. v. Johnson, 264 U. S. 375..... 29
Robertson v. Baldwin, 165 U. S. 275..... .....14, 15
The Osceola, 189 U. S. 158.....5, 28
Van Camp Sea Food Co., Inc. v. Nordyke, 140 F. (2d) 902.....
.....3, 32, 33, 35, 36, 37

STATUTES.

Act of June 30, 1879, Chap. 52, Sec. 2, 21 Stat. 43..... 17
Act of March 3, 1911, Chap. 231, Sec. 271, 36 Stat. 1164 (28 U. S. C. A. 411)..... 17
California Code of Civil Procedure, Sec. 170, Subd. 5..... 17
California Code of Civil Procedure, Sec. 602, Subds. 5, 6, 7..... 17
Revised Statutes, Sec. 800..... 17

TEXTBOOKS.

18 American Jurisprudence, Sec. 10, p. 133..... 26

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. .....

MARTIN LUKSICH,

Petitioner,

vs.

DOMENIC MISETICH, JAKOV MISETICH, IVAN MISETICH, and ANTON MISETICH,

Respondents,

BRIEF OF RESPONDENTS IN REPLY TO PETITIONER'S BRIEF.

To the Honorable, The Supreme Court of the United States, The Honorable Chief Justice and The Honorable Associate Justices Thereof:

May It Please The Court:

Respondents occupy the unusual position of supporting the contention of the petitioner that this Honorable Court issue its writ of certiorari for the purpose of reviewing the judgment of the United States Circuit Court of Appeals and for the purpose of reconsidering and restating the many questions of admiralty law involved in order that there be an end to confusion and uncertainty in the minds

of employers of seamen with reference to their liabilities and the bases thereof.

On the surface, it appears that the only questions involved in the pending matter are those set forth on pages 14 and 15 of petitioner's brief.

Careful scrutiny will disclose that there are several underlying basic principles which must be the subject of examination and decision by this Honorable Court.

In the event this Honorable Court grants the petition in this case, it is respectfully contended by respondents that the following basic propositions should be the subject of unequivocal decision:

1. Is a seaman, injured to the extent that he must leave the service of the ship for medical attention ashore, entitled, as a matter of law, to whatever wages or share he might have earned to the end of the specific voyage during which he sustained such injury, or is he entitled to his prospective wages or share for the entire term of the specific contract of employment in effect at the time he sustains the injury?

If such injury is one which permanently and totally disables the seaman from following his occupation as a seaman, is he, as a matter of law, entitled to maintenance during the balance of his natural life or during whatever period of time medical or surgical care is beneficial to the seaman?

2. Does the court-made rule that a seaman is a ward of the admiralty *courts* and must be treated as such in the decision of disputed issues in litigation between a seaman and his employer, violate the constitutional right of the employer to procedural due process of law?

3. Do the decisions of this Honorable Court, in construing the provision for the election to be made by a seaman, as provided in the Jones Act, violate the mandate of the Constitution that all persons are entitled to the equal protection of the law?

4. Do the decisions construing the Jones Act and its place in the maritime law deprive employers of seamen of their property without due process of law?

5. Does the United States Supreme Court have jurisdiction of the persons and subject matter?

6. If the case of *Van Camp Sea Food Co. Inc. v. Nordyke* (140 F. (2d) 902), also pending herein on petition for writ of certiorari and numbered 959, is not in conflict with applicable decisions of this Honorable Court and correctly construes the scope of a seaman's action for damages under the Jones Act, then the judgment on the first cause of action in the case at bar is *res judicata* as to libellant's claim for wages and maintenance.

Summary.

It may not seem obvious that whether an injured seaman is entitled to "wages to the end of the voyage, maintenance and care" is a matter that necessarily involves a consideration of the election of remedies required by the Jones Act. Respondents contend that it does because every seaman who is injured under circumstances warranting a recovery of compensatory damages is entitled to have included in the amount of his recovery the common-law *equivalent* of loss of wages—past and future. The earning capacity of a seaman is the sum of his cash wages plus the reasonable value of his "room and board" while on a ship. He is also entitled to recover, as special damages, the incurred expense of medical and hospital care *and* the present value of all future medical and hospital care if the evidence shows a reasonable probability of the necessity of such care. The petitioner in the case at bar elected to sue pursuant to the Jones Act. The fact that he did not prevail on that cause of action is not sufficient to relieve him of the effect of the election. If he had prevailed on the first cause of action, would he be entitled to collect again for the same elements of damage simply because they are given a different name in the action *ex contractu*?

ARGUMENT.

(Note: Unless otherwise specifically noted, all emphasis is added in excerpts from decisions set forth herein.)

POINT I.

Is a Seaman, Injured to the Extent That He Must Leave the Service of the Ship for Medical Attention Ashore, Entitled, as a Matter of Law, to Whatever Wages or Share He Might Have Earned to the End of the Specific Voyage During Which He Sustained Such Injury, or Is He Entitled to His Prospective Wages or Share for the Entire Term of the Specific Contract of Employment in Effect at the Time He Sustains the Injury?

If Such Injury Is One Which Permanently and Totally Disables the Seaman From Following His Occupation as a Seaman, Is He, as a Matter of Law, Entitled to Maintenance During the Balance of His Natural Life or During Whatever Period of Time Medical or Surgical Care Is Beneficial to the Seaman?

Until recent years, a seaman injured in the service of the ship was entitled, as a matter of law, to wages "to the end of the voyage." (*The Osceola,* 189 U. S. 158, 175.)

In the case of *Enochasson v. Freeport Sulphur Co.,* 7 F. (2d) 674, 676, the United States District Court held that "libellant, having shipped for six months, is entitled to recover his wages to the end of his contract."

The Court also says:

"The Osceola merely states the rules applicable in different jurisdictions, without a discussion of the principles which make those rules sound, and, as is the case where there is only a 'bare bones' statement of a rule, the application of that rule continues to be involved in uncertainty. A slight reflection upon the principles which must be the basis of the rules will, I think, make it clear that the term 'voyage,' as used in the authorities, has reference, not to a particular passage from port to port, but to the *whole term of the mariner's employment.*" (7 F. (2d) 674, 675.)

In *O'Donnell v. Great Lakes Dredge & Dock Co.*, 127 F. (2d) 901, 902-903, the Court says:

"The record discloses that immediately after the injury, the injured seaman was removed to a hospital and there treated until August 27, 1940, when he was discharged at his own request and taken to his home. The court found as a fact that the appellant had been engaged in seasonal work under a contract for wages at $95 per month and his board and lodging valued at $1.40 per day and that the season began in March and ended in November, and concluded that the appellant was not entitled to maintenance, but awarded to appellant a sum equal to the amount he would have earned under the unexpired term of his contract at the rate of $95 per month. The argument is that appellant should recover in addition to his wages, his maintenance at the rate of $1.40 per day.

"Unquestionably, the owner of a vessel is liable to a seaman injured in the service of his ship, for wages and keep during the *employment,* Calmar,

etc. v. Taylor, 303 U. S. 525, 58 S. Ct. 651, 82 L. Ed. 993; Smith v. Lykes, etc. Co., 5 Cir., 105 F. (2d) 604, comparable to that to which the seaman is entitled while at sea, The Henry B. Fiske, D. C., 141 F. 188; The Mars, D. C., 145 F. 446; Id., 3 Cir., 149 F. 729, and his right to maintenance may extend beyond the term of service, Calmar case, *supra,* 303 U. S. page 529, 58 S. Ct. 651, 82 L. Ed. 993.

"Under the circumstances here appearing, we are of the opinion that appellant was entitled to recover his wages at the rate of $95 per month, including his maintenance at the rate of $1.40 per day. Accordingly, the judgment is reversed, and the cause is remanded to the District Court with directions to enter a judgment for appellant for such sum as may be proved to be due upon the principles here determined." (127 F. (2d) 901, 902-903.)

In *Mason v. Evanisevich,* 131 F. (2d) 858, 859, the Court says:

"Appellants do not contend that an injured fisherman's share is confined to the first of these one day voyages. They admit that the share right extends through the voyages of the first lunar month of the season. No authority or proof of custom is shown for shortening to its first month the seasonal employment for which appellee was entitled to the share, undisputed in amount, which the court awarded him from the catch of the entire season. Cf. A. O'Donnell v. Great Lakes Dredge Co., 7 Cir., 127 F. (2d) 901, 903; Enochasson v. Freeport Sulpher Co., D. C. S. D. Tex. 7 (2d) 674, 676, and cases cited."

The Court below in the case at bar says as follows:

> "There is no dispute herein that a seaman injured in the course of his employment is entitled to his wages for the length of the voyage or employment, The Osceola, 189 U. S. 158, 175, or in the case of a fisherman employed on shares for a fishing season, to his share of the catch for the season, Mason v. Evanisevich (C. C. A. 9), 131 Fed. (2d) 858, 859. The point in dispute is the duration of the term for which libellant's share of the catch should be computed, whether for the tuna season or for the tuna and sardine seasons combined." [R. 270-271.]

The record on file herein shows that in May 1941 and prior thereto, the libellant was a member of a fishermen's union [R. 36]. The record also contains a copy of the agreement, in effect at the time of the accident involved herein, between the master of the fishing vessel "Lucky Star" and the United Fishermen's Union of the Pacific [R. 196-202].

This agreement shows that there was in existence a contract pursuant to which said union was to be the bargaining agency of the crew of the fishing vessel, "Lucky Star" [R. 196].

The agreement also shows that each member of the United Fishermen's Union of the Pacific, employed as a fisherman on a share basis on said vessel, was to pay his share of all food bills [R. 199].

Maintenance, according to all of the general language used in the decisions, refers to sleeping quarters and board. In the case at bar, if the petitioner is entitled to maintenance, it is only because he would have been entitled to it as a part of his contract of employment.

Usage and custom are only applicable and inferentially included in a contract of employment when nothing is said to the contrary with reference thereto in the contract. In view of the fact that the petitioner agreed to pay for his own board, he would not be entitled in any event to board as part of maintenance ashore. The maintenance to which he would be entitled, to use the words of this Honorable Court, "is comparable to that to which the seaman is entitled while at sea." (*Calmar S. S. Corp. v. Taylor,* 303 U. S. 525, 528.)

In *National Labor Relations Board v. Waterman S. S. Corp.*, 309 U. S. 206, this Honorable Court held that the National Labor Relations Act applied to seamen. The Court says:

> "The protection to seamen embodied in the Federal statutes which have been referred to has existed in some form since the earliest days of the Nation. This statutory plan was never intended to forbid the parties from mutually undertaking to assure a crew the right to continue as employees and to re-sign if it desires after signing off articles at a voyage's end. The design was to protect seamen from being carried to sea against their will; to prevent mistreatment as to wages and to assure against harsh application of the iron law of the sea during voyages. The Board, therefore, properly heard evidence as to whether the crews of the 'Bienville' and 'Fairland' had, unless discharged for cause, a continuing tenure or relationship entitling them to re-sign when the temporary lay-ups of their ships ended. If, as the Board found, there were such *continuing* tenure and customary term or condition of employment, of course no vacancies occurred when the men of the 'Bienville' and the 'Fairland' signed off articles in Mobile. And

respondent's contract with the I. S. U., which only provided preferential treatment of the I. S. U. (A. F. of L.) in filling vacancies, did not require the Company to discharge the N. M. U. (C. I. O) men from these ships.

"If, therefore, there was substantial support in the evidence for the findings that these crews had a continuing right to and customary tenure, term or condition of employment within the purview of the Act even though their ships were temporarily laid up, and that this relationship was terminated by the Company because of the crews' C. I. O. affiliation, the court below was required to enforce the Board's order." (309 U. S. 206, 212-213.)

* * * * * * * *

"All the evidence on this issue which the Board had before it has, of course, not been set out. In summary, it is glaringly apparent that men who had in various capacities followed the sea in the aggregate for roughly a hundred years, offered testimony that a seaman's tenure and relationship to his ship and employer are not terminated by the mere expiration of articles when his ship lays up in dry dock or for repairs, and that the Waterman Company—and maritime people generally—have recognized and followed this custom. Even the Waterman Company's executive vice-president could cite only one instance in the Company's recent past in which this custom had been departed from, but that particular mass firing of the crew of a ship headed for a temporary lay-up was directed against the only C. I. O. crew, other than those of the 'Bienville' and 'Fairland,' with which the Waterman Company apparently had been asked to deal. And the master of the 'Fairland,' with personal knowledge of the Company's practice reaching back to 1924, had never heard of 'another case where the entire crew was laid off.'

> "In the words of the Act, an employer cannot terminate his employees' 'tenure of employment or any term or condition of employment' because of union activity or affiliation. These words are not limited so as to outlaw discrimination only where there is in existence a formal contract or relation of employment between employer and employee. They embrace, as well, all elements of the employment relationship which in fact customarily attend employment and with respect to which an employer's discrimination may as readily be the means of interfering with employees' right of self-organization as if these elements were precise terms of a written contract of employment." (309 U. S. 206, 218.)

The respondents are most anxious to ascertain whether they may enter into written contracts with competent and physically sound fishermen pursuant to which respondents will agree to employ such fishermen for a term of years, without being faced with the obligation to pay to such fishermen a share of all fish taken during such period of years if any such fishermen, at the commencement of the employment, unfortunately sustain injuries resulting in permanent and total disability.

If the decisions in the *Enochasson, Evanisevich* and *Luksich* cases state the true rule, then such rule will certainly interfere with the willingness of employers of fishermen to enter into any contracts with unions pursuant to which the members of such unions will be given a right to permanent employment. This Honorable Court should not approve the growth of the unsound principle that any seaman, permanently disabled in the service of the ship,

is unqualifiedly entitled to demand wages to the end of the term of employment provided for in the contract of employment in effect at the time such injury is sustained. Such rule would effect not only fishermen, *if* fishermen *are* merchant marine seamen, but all seamen engaged as such in the vast merchant marine which is now on the high seas under the American Flag. This Honorable Court should not approve any such rule on the assumption that the fishing "industry" is better able to stand the economic loss than is the injured seaman. There is no statute which makes it obligatory that owners of fishing vessels or any vessels which are navigated on the high seas procure what might be called the equivalent of insurance coverage against liability imposed by workmen's compensation laws. Each boat owner and employer of fishermen is an individual engaged as such in the conduct of his own enterprise. It is true that he can obtain insurance indemnifying him against liability on account of his contractual obligation to pay maintenance and to pay wages in the event a fisherman is injured in the service of the ship. This Honorable Court knows that insurance premiums are predicated upon the risks assumed. If insurance companies are faced with the possibility of paying a pension in the form of maintenance and thousands of dollars in the form of unearned wages every time a fisherman is permanently injured in the service of the ship, the premiums would soon put the owner of the fishing vessel out of business. This is not a matter which can be handled by saying "the cost can be spread over the industry."

Up to now insurance rates protecting individuals, such as respondents, have been reasonable enough to justify fishing boat owners in absorbing said premiums as a part

of their share of conducting the enterprise. The fishermen are not satisfied with getting a full share for the season during which they were injured; now they want a full share of the catch during two seasons. Next, after obtaining the approval of this Honorable Court of the "two seasons" contention, the fishermen will make claim for four seasons and so on, *ad infinitum.*

It is common knowledge on the Pacific Coast that many fishermen employed on a share basis are now earning at least $5,000 per year and at times as high as $10,000 a year. If, by reason of their union affiliations and the great power which has been accorded organized labor by the National Labor Relations Act, the fishermen are able to "persuade" the owners of fishing vessels to agree in advance to a five year term of employment, a permanent disabling injury sustained at the outset of the employment would result in the payment of quite a tidy sum for the element of wages "to the end of the voyage" alone. If we add to this a right, as a matter of law, to maintenance for the balance of the fisherman's life, how long will it take to kill the goose that lays the golden egg? If we add the assumption that the injury is proximately caused by the negligence of a fellow servant or the unseaworthiness of the vessel or a failure to supply and keep in order the proper appliances appurtenant to the ship, the amount of cash collected from the employer could easily exceed the value of the boat, and there could be no limitation of liability. Fault and privity would take care of that matter.

POINT II.

Does the Court-made Rule That a Seaman Is a Ward of the Admiralty Courts and Must be Treated as Such in the Decision of Disputed Issues in Litigation Between a Seaman and His Employer, Violate the Constitutional Right of the Employer to Procedural Due Process of Law?

In *Robertson v. Baldwin,* 165 U. S. 275, 287, the Court says:

> "Indeed, seamen are treated by Congress, as well as by the Parliament of Great Britain, as *deficient* in that full and intelligent responsibility for their acts which is accredited to *ordinary* adults, and as needing the protection of the law in the *same* sense in which *minors* and *wards* are entitled to the protection of their parents and guardians: *Quemadmodum pater in filios, magister in discipulos, dominus in servos vel familiares.* The ancient characterization of seamen as 'wards of admiralty' is even more accurate now than it was formerly."

The case of *Robertson v. Baldwin* (*supra*), which was decided January 25th, 1897, long before the enactment by The Congress of the all inclusive, protective statutes applicable to employers of seamen and to the seamen themselves and long before the enactment of the National Labor Relations Act and the advent of powerful unions as the representatives of seamen, is referred to with approval by this Honorable Court in *Calmar S. S. Corp. v. Taylor,* 303 U. S. 525, 529, decided March 28, 1938.

It is respectfully contended that when the reason for a rule ceases, the rule should likewise cease. Men employed as seamen today are not, as a matter of law, or *en masse,*

"deficient in that full and intelligent responsibility for their acts which is accredited to ordinary adults." Seamen who are citizens of the United States of America are not, *en masse*, illiterate, ignorant, helpless or unable to deal with employers on an equal basis. The genesis of the notion that seamen as a class should be treated as minors or wards entitled to the protection of their parents or guardians, respectively, is the fact that a hundred years ago, in the British Empire, there were no public schools and only the children of the wealthy or the substantial middle classes had any opportunity whatever to procure acedemic training. Respondents have not been able to ferret out the first case wherein the English courts referred to seamen as "wards" but there is slight doubt about the proposition that if the origin of the idea is found there will be a reference to the fact that seamen in those olden times were wards of *The* Admiralty. So far as respondents are advised, "The Admiralty" as used by the British courts did not refer to the *Court* of Admiralty but referred to that part of the *administrative* branch of the governmental system in effect at the time which had control over shipping and maritime matters.

It is unfortunate that the idea has taken hold in this country. Reflection upon the subject will demonstrate that no court in the United States can take the position that one of the litigants is a ward of the *court*.

If we advert for the moment to the implications involved in the reiteration of the rule set forth in the case of *Robertson v. Baldwin* (*supra*) the result is shocking, to say the least. In order to emphasize the point, respondents paraphrase as follows: Whenever a seaman is involved in litigation with his employer the *court* must

assume the same protective and partial attitude toward the seaman as would the seaman's parents or the guardian of the person and estate of the seaman.

If a court, sitting in admiralty, must assume such relationship to the seaman in all such litigation, then common law courts, required by the decisions of this Honorable Court to proceed in accordance with the substantive maritime rules, must do likewise. If it is an obligation on the part of a judge (presumably impartial and unbiased), to assume the protective and partial attitude of a parent or guardian, then it is the obligation of jurors in federal and state courts, before whom Jones Act cases are tried, to do likewise.

> "Due process implies a tribunal both *impartial* and mentally competent to afford a hearing."
>
> *Jordan v. Massachusetts,* 225 U. S. 167, 176.

> "The policy underlying the obligation, so cogently stated by Justice Story in Harden v. Gordon, 2 Mason, 541, Fed. Cas. No. 6,047 (C. C.) *supra,* and the liberality with which admiralty *courts* have traditionally interpreted rules devised for the benefit and protection of seamen who are *its* wards, Robertson v. Baldwin, 165 U. S. 275, 287, 41 L. ed. 715, 719, 17 S. Ct. 326; Cortes v. Baltimore Insular Line, *supra* (287 U. S. 377, 77 L. ed. 374, 53 S. Ct. 173); The Arizona v. Anelich, 298 U. S. 110, 123, 80 L. ed. 1075, 1081, 56 S. Ct. 707, call for some extension of the duty beyond the term of service."
>
> *Calmar S. S. Corp. v. Taylor,* 303 U. S. 525, 529.

Let us apply this "ward of the admiralty *courts*" maxim, in its full vigor, for the purpose of ascertaining whether it is one of the substantive rules of the general maritime

law. This Honorable Court has held that regardless of the forum which may be selected by a seaman to prosecute any cause of action accorded him by the general maritime law, even as modified by the Jones Act, all courts must proceed in accordance with the substantive maritime law as declared by the decisions of this Honorable Court and other federal courts. Would a plaintiff's counsel, in a Jones Act case being prosecuted in a state court or on the law side of a district court of the United States, be entitled to ask each prospective juror, whether he would decide the case on the evidence presented, as though he were the father or mother or guardian of the person and *estate* of the plaintiff? (Please see: *R. S.*, Sec. 800; June 30, 1879, c. 52, sec. 2, 21 stat. 43; March 3, 1911, c. 231, sec. 271, 36 stat. 1164, 28 U. S. C. A. 411; *California Code of Civil Procedure,* Sec. 170, Subdivision 5; *California Code of Civil Procedure,* Sec. 602, Subdivisions 5, 6 and 7.) The fees of guardians of estates fluctuate as the estate increases or decreases. Parents and guardians are inclined to overlook obvious moral deficiencies in their children and wards. In the eyes of some parents a deliberate lie by the child is not regarded as a serious offense if it affects only some person who is not a member of the family. Is a judge or juror required to assume such status? An impartial tribunal cannot exist when the court is in *loco parentis.* What is the *factual* basis for assuming that present day seamen are entitled to treatment different from that given to railway employees under the Employers' Liability Act?

In the case of *Aguilar v. Standard Oil Co. of New Jersey,* 318 U. S. 724, this Honorable Court gives a hint that the time has arrived when injuries received as a

result of intoxication will be regarded as injuries sustained "in the service of the ship." The Court says:

> "Only some wilful misbehavior or deliberate act of indiscretion suffices to deprive the seaman of his protection. The Ben Flint, 1 Abb (US) 126 1 Biss 562, Fed Cas No 1,299 (DC) *supra*. The traditional instances are venereal disease and injuries received as a result of intoxication, though on occasion the *latter* has been qualified in recognition of a classic predisposition of sailors ashore. Other recent cases however disclose a tendency to expand these traditional exceptions." (318 U. S. 724, 731.)

This Honorable Court has held that a master of a vessel is a seaman within the meaning of the Jones Act. All members of the crew are seamen within the meaning of the Jones Act. Is the master of a vessel entitled to get himself into a state of intoxication because of the "classic predisposition of sailors ashore?" In the event a master or any member of the crew of a vessel, while ashore on leave for the purpose of diversion, becomes intoxicated and injures another member of the crew, is the employer responsible for the injuries so inflicted, upon the theory that the drunken master or drunken fellow crew member is engaged in the service of the ship and that the seaman who is the victim of such injury is also, while ashore for the purpose of diversion, engaged in the course of his employment, as that language appears in the Jones Act?

POINT III.

Do the Decisions of This Honorable Court, in Construing the Provision for the Election to be Made by a Seaman, as Provided in the Jones Act, Violate the Mandate of the Constitution That All Persons Are Entitled to the Equal Protection of the Law?

Is it not true that, as construed and applied by the decisions of this Honorable Court, a seaman who pursues his right under the new rules created by the Jones Act, actually reaps more benefits from the Federal Employers' Liability Act than would an employee of a railroad maintaining an action pursuant to said Federal Employers' Liability Act?

This Honorable Court has used much general language which assumes, without *deciding* the question as a *disputed* issue of law, that the Jones Act includes every cause of action which was available to seamen under the general maritime law prior to the adoption of the statute, plus the additional right resulting from the elimination of the fellow servant doctrine, excepting the contractual right to wages, maintenance and care.

The cases refer to negligently defective ships and negligently defective appliances as the basis of causes of action included within the Jones Act. If this is so, then the injured seaman obtains a great advantage over railroad employees. The railroad employee is entitled to have included in any lump sum judgment recovered by him, the following elements of damage:

(a) Pain and suffering, past, present and future.

(b) Wages lost from the time of the injury up to the time of the trial; as special damage.

(c) That amount which represents the present pecuniary value of the lost earning capacity of the railroad employee, as part of the general damage.

(d) All past medical attention and hospital care, including nursing, X-rays, medicines, appliances and physiotherapy treatments.

(e) The present pecuniary value of all medical attention and hospital care, including nursing, X-rays, medicines, appliances and physiotherapy treatments reasonably certain to be required between the date of the judgment or verdict and the death of the plaintiff.

Michigan Central R. Co. v. Vreeland, 227 U. S. 59;
Arizona Eastern R. Co. v. Bryan, 242 U. S. 621;
Chesapeake etc. R. Co. v. Carnahan, 241 U. S. 241;
Keathley v. Chesapeake etc. R. Co., 85 W. Va. 173, 102 S. E. 244;
Nashville etc. Ry. v. Henry, 158 Ky. 88, 164 S. W. 310;
Matthews v. Atchison etc. Ry. Co., 54 Cal. App. (2d) 549, 129 P. (2d) 435;
Newkirk v. L. A. Junction Ry. Co., 20 Cal. (2d) 308, 131 P. (2d) 535.

There is nothing in the Jones Act which purports to exclude from any verdict which a jury might render in an action at law commenced in a District Court of the United States or in any state court any of the elements of damage which are recognized under the common law as recoverable in an action for damages for personal injuries. Therefore, the injured seaman, pursuing his cause of action under the Jones Act, in which action "*all* statutes of the United States *modifying* or *extending* the common law right or remedy in cases of personal injury

to railway employees *shall* apply," would be entitled, if he prevails, to a verdict and judgment based thereon which would include each of the elements of damage recoverable by an injured railway employee.

The injured seaman may commence his action for damages under the Jones Act in a state court and after the judgment is paid off he is entitled as respondents read the decisions of this Honorable Court, to sue his employer either by libel *in personam* or libel *in rem* against the ship in a United States District Court, or to sue his employer in an action commenced and maintained in a common law court for the purpose of recovering his "wages to the end of the voyage," maintenance and care. This Honorable Court has held that the right of a seaman to recover wages and the expense of maintenance and care is a *cumulative* right and is not affected in the slightest degree by the fact that the seaman has already recovered a judgment for damages under the Jones Act or for indemnity under the general maritime law. (*Pacific S. S. Co. v. Peterson,* 278 U. S. 130.)

If the cases which have referred generally to the subject matters of election, inconsistent causes of action and cumulative rights are sound, then what has been recovered in one action is of no moment in the trial of the other.

How can it be said that railway employees are protected by the Federal Employers' Liability Act to the same extent as injured seamen under such circumstances? The seaman gets not only the present value of his lost earning capacity but the *full* amount of all wages he might have earned during the entire term of his employment. The seaman *also* gets maintenance during the entire time

that he is disabled, in the event his injury was sustained while in the service of the ship. According to the hint in *The Calmar* decision (303 U. S. 525), this will be for life. The element of damage consisting of the present value of the future loss of earnings in a case involving an injured railway employee is allowed by the law for the reason that it is supposed to take the place of the wages he would have earned in the future in the event he had not been injured. Railway employees are required to maintain themselves and provide for their own shelter, food, warmth and medical attention, out of their wages. They are also required to pay all medical bills and hospital bills which might be incurred subsequent to the entry of judgment, in the event such future medical attention or hospital care is required in the treatment of the injuries sustained. The seaman gets allowances for all these elements in his verdict in an action for damages under the Jones Act or in an action to recover indemnity under the general maritime law. With specific reference to the element of damage consisting of lost earning capacity and the loss of earnings between the date of the injury and the date of the trial, an injured seaman prosecuting his action for damages fixes his lost wages by testifying to the amount of cash he received, *plus* the pecuniary value of his quarters and the food furnished him aboard ship. In *addition*, the seaman recovers the full amount of that part of the wages consisting of cash which he would have earned to the end of the term of employment and the cash value of the quarters and food furnished him while aboard the ship, in his *ex contractu* action for wages, maintenance and care.

Can it be said that there is an equal protection of the law under such circumstances?

POINT IV.

Do the Decisions Construing the Jones Act and Its Place in the Maritime Law Deprive Employers of Seamen of Their Property Without Due Process of Law?

The argument presented in support of the point immediately preceding this is likewise applicable to the proposition now being discussed. Why should any seaman be allowed a double recovery? Would this Honorable Court have sustained the various workmen's compensation statutes which have received its attention, including the Longshoremen's and Harbor Workers' Compensation Act, if such statutes had provided that any injured employee could have all of the benefits of such workmen's compensation laws and also sue the employer under the common law, in the event the employee could allege and prove the essential bases of actionable negligence?

Respondents assume that any such statute would be condemned for the reason that it would be in contravention of the Fifth Amendment to the Constitution of the United States. Going a step further, if any workmen's compensation statute purported to fasten a liability upon the employer for the payment or furnishing of the benefits commonly enjoyed by workmen pursuant thereto, and in addition attempted to fasten such liability, with or without fault, on each individual employer without any attempt to spread the cost thereof over the industry in which the employer happened to be engaged, and in addition gave the injured employee the absolute right to pursue a common law cause of action against the employer for *full* compensatory damages, would this Honorable Court sustain such statute in the face of a claim

that such statute deprived such individual employer of his property without due process of law? If the answer to either of these questions is in the negative, how can the Jones Act escape condemnation upon the ground that it is likewise unconstitutional if a literal construction thereof indicates that a seaman is entitled to have his cake and eat it too?

In addition to what has been said, this Honorable Court, in the case of *Mahnich v. Southern S. S. Co.*, 88 L. Ed. Ad. Op. 414, holds that the general maritime law gives every seaman, injured as a result of the unseaworthiness of a vessel or a failure to furnish adequate appliances, a right to recover full compensatory damages, even though the officers of a vessel are guilty of negligence which contributes to such unseaworthiness or the presence of a single unseaworthy appliance anywhere on the vessel. The Court also indicates that if the unseaworthiness of a vessel or any defective rope or other appliance which may be found anywhere on the vessel is the result of any act, negligent or otherwise, of a fellow servant, the injured seaman is entitled to recover indemnity by way of full compensatory damages for any injury proximately caused thereby. The Court says:

> "It would be an anomaly if the fellow servant rule, discredited by the Jones Act as a defense in suits for negligence, were to be resuscitated and extended to suits founded on the warranty of seaworthiness, so as to lower the standard of the owner's duty to furnish safe appliances below that of the land employer." (*Mahnich v. Southern S. S. Co.*, 88 L. Ed Ad. Op. 414, 418.)

In the case of *Pacific S. S. Co. v. Peterson*, 278 U. S. 130, 139, the Court says:

> "Considered in the light of these several remedies and the extent of the *inconsistency* between them, we agree with the view expressed by the Supreme Court of Washington that the statute was not intended to restrict in *any* way the long-established right of a seaman to maintenance, cure, and wages,—to which it made no reference. And we conclude that the alternative measures of relief accorded him, between which he is given an election, are merely the right under the *new* rule to recover compensatory damages for injuries caused by negligence and the right under the *old* rules to recover indemnity for injuries occasioned by unseaworthiness; and that no election is required between the right to recover compensatory damages for a tortious injury under the new rule and the contractual right to maintenance, cure and wages under the old rules—the latter being a *cumulative* right in *no* sense inconsistent with, or an alternative of, the right to recover compensatory damages."

Respondents are unable to understand the present state of the law with reference to election.

> "Election is predicated on the existence of a state of facts that furnishes the party an option to do either the one thing or the other. There must be the possibility of the adoption or rejection of a theory of action. This principle applied to the doctrine under consideration gives us the well-established proposition that an election of remedies presupposes a right to elect. There must be present such a condition of *facts* as affords the party a *choice* of remedies inconsistent in character, as where a choice lies between remedies at law and in equity or where a

suit may be brought on a given state of facts either on contract or in tort or by attachment or replevin. If in truth there is only one remedy, and not a choice between two or more, the doctrine of election does not apply, as where a party misconceives his remedy and the one on which he expected to rely was never available to him. Two antagonistic actions instituted at the same moment leave no opportunity for choice . . ."

18 *American Jurisprudence*, 133, Sec. 10.

In the case of *Beadle v. Spencer*, 298 U. S. 124, this Honorable Court affirmed a judgment recovered by a seaman in an action maintained pursuant to the Jones Act to recover for personal injuries due to an alleged negligent failure to provide the seaman with a safe place to work. The *Beadle* case therefore necessarily involved exactly the same principle which is involved in the case of *Mahnich v. Southern S. S. Co., supra.* The duty of an employer of a seaman to furnish a seaworthy ship and to supply and keep in order the proper appliances appurtenant to a ship is the equivalent of the duty of a land employer to furnish a reasonably safe place to work and reasonably safe tools and appliances with which to work.

This Honorable Court held that the cause of action involved in the case of *Beadle v. Spencer* was one which could be asserted pursuant to the Jones Act. It now appears that the cause of action asserted by Spencer was a cause of action available to him without reference to the Jones Act. In other words, if Anton Mahnich is entitled to recover indemnity under the general maritime law under the circumstances set forth by this Honorable Court in his case, then Spencer was entitled to do the same thing.

A comparison of the two cases presents a dilemma to all trial judges in federal and state courts. This Honorable Court states in the case of *Pacific S. S. Co. v. Peterson,* 278 U. S. 130, that any cause of action for indemnity under the general maritime law is inconsistent with the remedy created by the Jones Act and that the seaman must elect between these inconsistent causes of action. No cause of action exists under the Jones Act unless the injury is sustained as a result of negligence. Therefore, if the prior decisions are sound, whenever negligence is included within the factual background of an injury, the cause of action is only cognizable in a Jones Act case.

According to the *Mahnich* case (88 L. Ed. Ad. Op. 414), it is now the law that even though a seaman sustains his injury as a result of the negligence of a mate or boatswain in negligently selecting an unsafe or inadequate rope, the seaman is entitled to recover damages under the general maritime law, without reference to the Jones Act at all. How can this result be squared with the rule announced by this Honorable Court in the case of *Pacific S. S. Co. v. Peterson* (*supra*), to the effect that these two remedies are *inconsistent?*

In the *Mahnich* case the boatswain and the mate examined the specific piece of rope which broke and caused the accident. After the accident "examination of the rope at the point where it broke showed that it was so rotten as to be inadequate to support the strain imposed upon it." Thus, the selection and examination of the rope were negligent acts on the part of fellow servants of Mahnich.

It is a certainty that The Congress did not have in mind, at the time it enacted the Jones Act, any idea that a seaman could recover indemnity from his employer under the general maritime law in the event he was injured as the result of negligence on the part of a master, mate, boatswain, or other fellow servant of an injured seaman, in or about the selection of an inadequate rope or other appliance. All The Congress knew about the law, at the time the Jones Act was being considered and also when it was enacted as a statute, were the rules of law which had been answered *prior* thereto by this Honorable Court and other federal courts. The rule which prompted The Congress to adopt the Jones Act was that set forth in *The Osceola,* 189 U. S. 158, 175, as follows:

> "* * * 2. That the vessel and her owner are, both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship. *Scarff v. Metcalf,* 107 N. Y. 211, 13 N. E. 796.
>
> "* * * 4. That the seaman is *not* allowed to recover an indemnity for the *negligence* of the master, or *any member of the crew,* but is entitled to maintenance and cure, whether the injuries were received by *negligence* or accident."

Please see, also:

Chelentis v. Luckenbach S. S. Co., 247 U. S. 372.

It is respectfully contended that the first two decisions of this Honorable Court which discussed the meaning of the election referred to in the Jones Act were conclusively correct and should be reasserted now. Individual

"hardship cases" cannot be permitted to change established rules of statutory construction or established principles of either the general maritime law or the common law. The case of *Pacific S. S. Co. v. Peterson,* 278 U. S. 130, was a "hardship case." The seaman had received maintenance and cure as far as medical and surgical attention could reasonably affect a cure and had also received his wages to the end of the voyage, prior to the time he commenced his suit for damages in the Superior Court of the State of Washington, under the Jones Act. The cases of *Panama R. Co. v. Johnson,* 264 U. S. 375 and *Engel v. Davenport,* 271 U. S. 33 were insuperable barriers unless they were overruled. The two cases announce a logical construction of what is meant by the election required to be made by a seaman. The result reached in the case of *Pacific S. S. Co. v. Peterson* has caused much confusion because the rules stated therein cannot be applied. If the cause of action for indemnity under the general maritime law and the cause of action created by the Jones Act are inconsistent, it would be impossible to make an election. Where two causes of action are inconsistent and repugnant to each other, it is axiomatic that no *choice* exists.

It is respectfully contended that this question of election as it involves injured seamen needs an overhauling and now is a good time to do it, because a clear statement of the rule will save much time of courts and juries throughout the land when the many cases we may expect as a result of the balloon-like expansion of the American Merchant Marine begin to find their way into the courts. If the facts of a case give only a right to a single remedy, there *cannot* be an election or choice of remedies.

POINT V.

Does the United States Supreme Court Have Jurisdiction of the Persons and Subject Matter?

An inspection of the record shows that originally this action was commenced on the law side of the United States District Court, Southern District of California, Central Division [R. 3-10].

The complaint *purports* to state three separate and distinct causes of action. The first is for damages under the Jones Act; the second is for maintenance and cure; and the third is for wages to the end of the alleged term of employment.

There are no allegations showing diversity of citizenship with reference to either of the three causes of action. The second cause of action involves a sum less than $3,000. The third cause of action involves a sum less than $3,000.

When the case was called for trial, it was *stipulated* that the case be transferred to the admiralty side and that all the causes of action be tried in admiralty [R. 35].

The substantial question involved is this: If the United States District Court was without jurisdiction of the action at the time it was filed, did it have any authority to do *anything* other than to *dismiss* the action for lack of jurisdiction?

The act of making an order transferring a case from the law side of a United States District Court to the admiralty side of said court is a judicial act of an affirmative character which affords relief to the plaintiff by saving him the expense of filing a new action on that side of the court which would have jurisdiction. It also affords the mistaken plaintiff relief by saving him the expense of serving process. It has been the rule from time immemorial that parties cannot stipulate to jurisdiction in a United States District Court.

It has also been the rule that the jurisdiction of federal courts cannot be enlarged by uniting in a single suit causes of action of which the court is without jurisdiction with one of which it has jurisdiction. (*Geneva Furniture Mfg. Co. v. Karpen,* 238 U. S. 254.)

If the United States District Court was without jurisdiction, then the Circuit Court of Appeals was likewise without jurisdiction. A trial *de novo* is a re-examination of a question of fact. If the United States District Court was without jurisdiction to originally try and decide the questions of fact, then the Circuit Court of Appeals was likewise without jurisdiction to do anything excepting to remand the case to the United States District Court with directions to dismiss the same.

POINT VI.

If the Case of Van Camp Sea Food Co. Inc. v. Nordyke (140 F. (2d) 902) Also Pending Herein on Petition for Writ of Certiorari and Numbered 959, Is Not in Conflict With Applicable Decisions of This Honorable Court and Correctly Construes the Scope of a Seaman's Action for Damages Under the Jones Act, Then the Judgment on the First Cause of Action in the Case at Bar Is Res Judicata as to Libellant's Claim for Wages and Maintenance.

Inspection of the amended complaint in the case at bar shows that the first cause of action was based upon the Jones Act, for the reason that it alleges the injury was the proximate result of negligence on the part of the master of the vessel [R. 23-25].

In the case of *Van Camp Sea Food Co. Inc.*, 140 F. (2d) 902, the first cause of action was purportedly predicated upon the Jones Act, in that the plaintiff alleged that his injury resulted from negligence on the part of the defendants "in failing to provide plaintiff with proper and adequate medical care and attention within a reasonable time after" his injury. [*Van Camp Sea Food Co. v. Nordyke*, No. 959, R. 6.]

In the same case, the second cause of action alleged that "plaintiff was forced to and he did incur the services of a competent physician to care and attend for his injury" and that he "was unable to perform work for a period of three months, of the reasonable value of $300.00, to his further damage in the sum of $900.00." [*Van Camp Sea Food Co. v. Nordyke*, No. 959, R. 7.]

In the *Nordyke* case, the trial court instructed the jury that the second cause of action was predicated upon the claim of plaintiff for "damages for medical attention and *maintenance.*" [*Van Camp Sea Food Co. v. Nordyke,* No. 959, R. 222.]

In the *Nordyke* case, the Honorable Circuit Court of Appeals says:

> "The appellee based and presented his entire action in the court below upon the Jones Act and in each cause of action he relied upon the same negligent acts of his employers. It was the seaman's right to recover in one action for all impairment due to his employers' negligence, including necessary medical expenses and loss of wages resultant from his employers' negligence. The method and procedure which the seaman adopted in the court below is not unlike the conventional action at law for damages for personal injury wherein the plaintiff pleads special damages separately from the compensation which is demanded and assessable for the disability, pain and suffering *per se.*
>
> "The complaint alleged and demanded general damages in the sum of $15,000, and the method adopted by the seaman of pleading the aggregate of additional special damages in a second cause of action at an amount not in excess of $3,000 in no manner impaired the jurisdiction of the District Court under the Jones Act to, as was done in the court below, hear and determine the whole case." (140 F. (2d) 902, 905.)

The rule of law stated in the case of *Van Camp Sea Food Co. v. Nordyke* (*supra*) must be considered in the light of the actual record which was before the court for

consideration. The court below has definitely held that a seaman may recover maintenance as part and parcel of a Jones Act cause of action, on the theory that maintenance is nothing but a specie of special damages.

In the case at bar, the respondents have a final judgment on the Jones Act cause of action [R. 222, lines 2-5].

In the case of *Grubb v. Public Utilities Commission*, 281 U. S. 470, 478-479, the Court says:

> "The thing presented for adjudication in the case in the state court was the validity of the order, and it was incumbent on the appellant to present in support of his asserted right of attack every available ground of which he had knowledge. He was not at liberty to prosecute that right by piecemeal, as by presenting a part only of the available grounds and reserving others for another suit, if failing in that. Werlein v. New Orleans, 177 U. S. 390, 398, *et seq.*, 44 L. ed. 817, 820, 20 Sup. Ct. Rep. 682; United States v. California & O. Land Co., 192 U. S. 355, 358, 48 L. ed. 476, 478, 24 Sup. Ct. Rep. 266.
>
> "As the ground just described was available but not put forward, the appellant must abide the rule that a judgment upon the merits in one suit is *res judicata* in another where the parties and subject-matter are the same, not only as respects matters actually presented to sustain or defeat the right asserted, but also as respects any other available matter which might have been presented to that end. Baltimore S. S. Co. v. Phillips, 274 U. S. 316, 319, 71 L. ed. 1069, 1071, 47 Sup. Ct. Rep. 600; United States v. Moser, 266 U. S. 236, 241, 69 L. ed. 262, 264, 45 Sup. Ct. Rep. 66; Cromwell v. Sac County, 94 U. S. 351, 352, 24 L. ed. 195, 197."

In the case of *Chicot County Drainage District v. Baxter State Bank*, 308 U. S. 371, 378, the Court says:

> "The remaining question is simply whether respondents having failed to raise the question in the proceeding to which they were parties and in which they could have raised it and had it finally determined, were privileged to remain quiet and raise it in a subsequent suit. Such a view is contrary to the well-settled principle that *res judicata* may be pleaded as a bar, not only as respects matters actually presented to sustain or defeat the right asserted in the earlier proceeding, 'but also as respects any other available matter which might have been presented to that end.' Grubb v. Public Utilities Commission, 281 U. S. 470, 74 L. ed. 972, 50 S. Ct. 374, *supra*; Cromwell v. Sac County, 94 U. S. 351, 24 L. ed. 195, *supra*."

It is therefore obvious that the final judgment in favor of respondents on the Jones Act cause of action involved in the case at bar effectively prevents the libellant from attempting to obtain a further or different adjudication of his claims for wages or maintenance, if the rule stated by the learned Circuit Court of Appeals in the case of *Van Camp Sea Food Co. v. Nordyke*, 140 F. (2d) 902, is the correct rule, for the simple reason that libellant could have recovered, under the first cause of action, in the event he prevailed therein, all of his claims for wages lost, present, past and future, and all of his claims for maintenance, past, present and future.

Thus, the question of law presented on the face of the petition for a writ of certiorari herein is inseparably tied to a consideration of the legal effect of the libellant's election to pursue a remedy under the Jones Act in his first cause of action.

Conclusion.

It is respectfully contended that this Honorable Court should not grant the petition for a writ of certiorari in the case at bar for the purpose of reviewing the questions of admiralty law suggested therein, without granting the petition in the case of *Van Camp Sea Food Co. v. Nordyke* (*supra*) at the same time. The two cases could and should be consolidated for argument, consideration and decision. The question whether any seaman is entitled to maintenance and wages is inextricably tied to the question whether he has a right to pursue a cause of action under the Jones Act. One decision by this Honorable Court can dispose of all questions of law which might be involved in the future in cases commenced by fishermen. If this Honorable Court is inclined to review the question of law presented by the election feature of the Jones Act, the two cases present a complete opportunity to do so. In order to determine whether a fisherman is entitled to a share of the catch during the entire term of his executory contract of employment it will be necessary to keep in mind the rights of other seamen who are employed on what we might call merchant marine vessels of the true type. There cannot be one rule for fishermen and another rule for seamen employed on freighters or passenger vessels. All must be treated alike. The question of the right to wages involves the question of procedural due process and also the basic constitutionality of the Jones Act, for the reasons hereinabove set forth. Therefore, the question of the right of any seaman to recover wages to the end of his term of employment should not be decided as an isolated element of the general maritime law. Each and every right which a sea-

man may have under the general maritime law, as modified by the Jones Act, bears a direct relation to all other rights. They should all be considered and decided together.

It is respectfully contended that this Honorable Court should review at this time all of the questions presented in the petition in the case at bar, in this respondents' brief in the case at bar, and in the petition in the case of *Van Camp Sea Food Co. v. Nordyke, supra.*

Respectfully submitted,

LASHER B. GALLAGHER,
Attorney for Respondents.